Supreme Court, U.S.
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No. 97-1468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRED CAMERON, JEFF BOWER
DAN McWILLIAMS, and DAVID CORTEZ,
Petitioners,

v.

ANHEUSER BUSCH, INC., ROBERT WARNER, GEORGE LOGAN, and RUSS WHITMEYER AND ASSOCIATES, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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20 pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent Anheuser-Busch, Inc.'s parent company is Anheuser-Busch Companies, Inc. The only non-wholly owned subsidiary of respondent Anheuser-Busch, Inc. is Somerset Distributors, LLC. Respondent Russ Whitmeyer And Associates, Inc. does not have any parent company or non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The Petition Mischaracterizes The Factual Circumstances Surrounding The August 18, 1995 Drug Search At Issue 2

B. ABI's Right To Conduct The August 18, 1995 Search Has Been Upheld By Five Separate Arbitrators 4

REASONS FOR DENYING THE PETITION 5

A. The Ninth Circuit Order Is Non-precedential . 5

B. The Ninth Circuit's Order Is Consistent With This Court's Section 301 Cases 5

C. The Ninth Circuit's Order Is Consistent With Other Ninth Circuit Cases 8

D. The Full Ninth Circuit Unanimously Rejected Petitioners' Suggestion For Rehearing *En Banc* 10

E. The Ninth Circuit's Order Is Consistent With Decisions From Other Circuits 10

CONTENTS - Continued

Page

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases:

In Re Amoco Petroleum Additives Co.
964 F.2d 706 (7th Cir. 1992) 10

Bagby v. General Motors Corp.
976 F.2d 919 (5th Cir. 1992) 11

Blanchard v. Simpson Plainwell Paper Co.
925 F. Supp. 510 (W.D. Mich. 1995) 11

Consolidated Rail Corp. v. Railway Labor Exec. Assn.
491 U.S. 299, 109 S. Ct. 2477,
105 L. Ed. 2d 250 (1989) 6

Caterpillar, Inc. v. Williams
482 U.S. 386, 107 S. Ct. 2425,
96 L. Ed. 2d 318 (1987) 5

Dancy v. Fina Oil & Chemical Co.
921 F. Supp. 1532 (E.D. Tex. 1996) 11

Espinal v. Northwest Airlines
90 F.3d 1452 (9th Cir. 1996) 9

Felt v. Atchison, Topeka & Santa Fe Railway Co.
60 F.3d 1416 (9th Cir. 1995) 9

Hawaiian Airlines v. Norris
512 U.S. 246, 114 S. Ct. 2239,
129 L. Ed. 2d 203 (1994) 2, 6, 7, 8, 9

AUTHORITIES - Continued

Page

Jackson v. Liquid Carbonic Corporation
863 F.2d 111 (1st Cir. 1988), cert. denied,
490 U.S. 1107, 109 S. Ct. 3158,
104 L. Ed. 2d 1021 (1989) 11

Kelly v. Mercoid Corporation
776 F. Supp. 1246 (N.D. Ill. 1991) 11

Kirby v. Allegheny Beverage Corp.
811 F.2d 253 (4th Cir. 1987) 11

Laws v. Calmat
852 F.2d 430 (9th Cir. 1988) 9

Lingle v. Norge Div. of Magic Chef
486 U.S. 399, 108 S. Ct. 1877,
100 L. Ed. 2d 410 (1988) 6

Livadas v. Bradshaw
512 U.S. 107, 114 S. Ct. 2068,
129 L. Ed. 2d 93 (1994) 2, 6, 7, 8, 9

Majors v. U.S. Air, Inc.
525 F. Supp. 853 (D. Md. 1981) 11

Mock v. T.G. & Y. Stores Co.
971 F.2d 522 (10th Cir. 1992) 10

Proffitt v. International Paper Co.
953 F. Supp. 207 (S.D. Ohio 1996) 11

AUTHORITIES - Continued

Page

Ramirez v. Fox Television Station
998 F.2d 743 (9th Cir. 1993) 7

Romero v. Hilton Hotels Corp.
137 L.R.R.M. (BNA) 2647 (D. Hawaii 1991) . . . 9

Schlacter-Jones v. General Tel. of California
936 F.2d 435 (9th Cir. 1991) 8, 10

Scott v. Machinists Automotive Trades Dist. Lodge No. 190
827 F.2d 589 (9th Cir. 1987) 9

Stikes v. Chevron USA, Inc.
914 F.2d 1265 (9th Cir. 1990),
cert. denied, 500 U.S. 917, 111 S. Ct. 2015,
114 L. Ed. 2d 101 (1991) 8, 9

Strachan v. Union Oil Co.
768 F.2d 703 (5th Cir. 1985) 11

Sweigart v. Delmotte
148 L.R.R.M. (BNA) 2413 (E.D. Pa. 1994),
affirmed, 74 F.3d 1228 (3rd Cir. 1995) 10

Utility Workers of America, Local No. 246 v. Southern California Edison, Co.
852 F.2d 1083 (9th Cir. 1988),
cert. denied, 489 U.S. 1078, 109 S. Ct. 1530,
103 L. Ed. 2d 835 (1989) 8

AUTHORITIES - Continued

Page

Wall v. Americold Corp.
1997 U.S. Dist. LEXIS 10366
(E.D. Pa. 1997) 11

Statutes:

29 U.S.C. Section 151 7

29 U.S.C. Section 185 1

42 U.S.C. Section 1983 7

Cal. Labor Code Section 203 . . . . . 7, 8

Rules:

Ninth Circuit Rule 36-3 . . . . . 1, 5

STATEMENT OF THE CASE

The petition seeks this Court's review of the Ninth Circuit's unpublished one-line order affirming the District Court's order granting summary judgment for respondents. ("We AFFIRM the District Court's grant of summary judgment to appellees.")[1] Petitioners' request for rehearing was denied by the Ninth Circuit panel deciding the appeal (Circuit Judges Pregerson, D.W. Nelson and Hawkins), and the full Ninth Circuit unanimously rejected petitioners' suggestion for rehearing *en banc*.[2] Petitioners argue review of the Ninth Circuit's order is warranted to clear up the "confusion" in the Ninth Circuit and other courts over the scope of preemption under Section 301 of the Labor Management Relations Act ("LMRA") [29 U.S.C. § 185].

As demonstrated below, this Court's review of the Ninth Circuit's order is unwarranted. The unpublished one-line order at issue is non-precedential.[3] The order hardly creates any conflicts between the circuits to be resolved by this Court. Moreover, the Ninth Circuit's order is completely

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[1]The Ninth Circuit's October 23, 1997 order affirming the summary judgment for respondents is attached to the petition as Appendix A. The July 8, 1996 judgment for respondents and the District Court's July 8, 1996 order granting respondents summary judgment are attached to the petition as Appendix C and Appendix D, respectively.

[2]The December 12, 1997 order denying the petition for rehearing and suggestion for rehearing *en banc* is attached as Appendix B to the petition.

[3]Pursuant to Ninth Circuit Rule 36-3, the order may not even be cited to or by other courts in the Ninth Circuit.

consistent with a long line of earlier Ninth Circuit decisions which uniformly applied Section 301 preemption principles to bar state law privacy and related claims under nearly identical circumstances, as well as with numerous decisions from other circuits. Contrary to petitioners' assertion, the Ninth Circuit's order is also entirely consistent with this Court's Section 301 cases, including the decisions in *Livadas v. Bradshaw*, 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994), and *Hawaiian Airlines v. Norris*, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994).

A. The Petition Mischaracterizes The Factual Circumstances Surrounding The August 18, 1995 Drug Search At Issue

The petition grossly exaggerates the factual circumstances surrounding the August 18, 1995 drug search at issue and ignores facts that are important for the Court's consideration of the petition. The relevant facts and supporting record evidence are set forth in the District Court's order granting respondents summary judgment (Appendix D to the petition).

Most notably, the petitioners were all employed with respondent Anheuser-Busch, Inc. ("ABI") pursuant to a collective bargaining agreement ("CBA") between ABI and their respective unions. The CBA's include provisions for drug testing, discipline and discharge, safety, and a grievance and arbitration procedure to challenge alleged violations of the CBA. The CBA covering petitioners McWilliams and Cortez also contains an express "management rights" clause.

For at least ten years before the August 18, 1995 search, ABI posted conspicuous signs at the employee entrances and exits advising employees of ABI's right to search employees and their vehicles parked on ABI property. ABI had an established practice to randomly search employees and employee property on ABI premises, and to discipline employees that refused to allow the search. ABI even used trained "sniff dogs" in an earlier locker room search. None of petitioners' unions ever challenged ABI's right to conduct searches, or to discipline employees as a result of the search or for refusing to allow the search, prior to the August 18, 1995 parking lot search at issue. The August 18, 1995 search was also consistent with ABI's longstanding policy prohibiting use or possession of drugs in the workplace.

ABI retained respondent Russ Whitmeyer And Associates, Inc. ("Whitmeyer"), a company with substantial experience assisting employers with drug elimination programs, to conduct the August 18, 1995 parking lot search. Whitmeyer used trained drug sniffing dogs to identify vehicles containing drug residue. If an employee's vehicle was identified as "positive," the employee was taken to a private room, along with his union steward, and asked to consent to a search of his vehicle and possessions. If the suspected employee refused to allow the search, the employee was suspended subject to termination. If illegal drugs or paraphernalia were discovered during the search, the employee was also suspended subject to termination. At no time during the search operation was anyone, including the petitioners, ever physically prevented from leaving the facility or subjected to any physical force.

B. ABI's Right To Conduct The August 18, 1995 Search Has Been Upheld By Five Separate Arbitrators

Petitioners Cameron and Bower were terminated as a result of the search; Cameron for refusing to consent to the search, and Bower for possession of drug paraphernalia. Petitioners Cameron and Bower filed grievances under the CBA challenging their terminations, and ABI's right to conduct the August 18, 1995 search, generally.[4] The grievances were pursued to arbitration, and both arbitrators held that ABI had the management right to conduct the August 18, 1995 search based on the terms of the CBA and its established practice to search employees on its property. Three other arbitrators reached the same conclusion in connection with grievances that were filed by other employees that were either terminated for refusing to consent to a search, or because drugs or paraphernalia were found in their vehicles.[5] In all five cases, the unions asserted that ABI breached the CBA in conducting the search. In all five cases, the arbitrators concluded that the search was permitted by the CBA. It is disingenuous, at best, for petitioners to assert that the CBA's are not at issue.

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[4]Petitioner McWilliams also filed a grievance challenging ABI's right to conduct the search but the grievance was resolved by his Union and ABI at the pre-arbitration step of the grievance procedure.

[5]These three employees filed their own action, and are represented by petitioners' attorney. Their lawsuit was also dismissed based on Section 301 preemption, and the appeal before the Ninth Circuit is still pending.

REASONS FOR DENYING THE PETITION

The Ninth Circuit's short, unpublished order summarily affirming the summary judgment for respondents is non-precedential. The order is consistent with other Ninth Circuit decisions, decisions from other circuits, and this Court's Section 301 cases. The full Ninth Circuit unanimously rejected petitioners' suggestion for a rehearing *en banc*. There is no "confusion" in the lower courts or conflict between the circuits as to any question raised by this case which is of such importance to warrant relief by this Court.

A. The Ninth Circuit Order Is Non-precedential

The Ninth Circuit's order summarily affirms the District Court's order granting respondents summary judgment. The order does not explain the basis for the ruling. (Appendix A) The order cannot be cited to or by other courts in the Ninth Circuit (Ninth Circuit Rule 36-3), much less by courts in other circuits. If the Section 301 issues raised by this case are as important and far reaching as petitioners suggest, they deserve a full discussion and analysis by a court of appeal before consideration by this Court. There is no sound reason for this Court to decide broad preemption issues based on the Ninth Circuit's one-line order.

B. The Ninth Circuit's Order Is Consistent With This Court's Section 301 Cases

The Ninth Circuit's order is entirely consistent with this Court's Section 301 preemption cases. As this Court has held, claims founded on rights created by a CBA are preempted by Section 301. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987).

Moreover, state law claims which are substantially dependent on the analysis of a CBA are also preempted by Section 301. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 405-6, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). In considering whether a state law claim requires analysis of a CBA and, therefore, is preempted, it is necessary to consider both express and *implied* terms of the CBA. *Consolidated Rail Corp. v. Railway Labor Exec. Assn.*, 491 U.S. 299, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) ("*Conrail*").

This Court's established Section 301 analysis has not been limited by *Livadas* or *Hawaiian Airlines* (referred to by petitioners as "*Norris*"). In *Hawaiian Airlines*, this Court held that the plaintiff's state law "whistle blower" claim was not preempted by the Railway Labor Act ("RLA") because only the employer's *motivation* for the plaintiff's discharge was at issue, not any rights or provisions under the CBA. *Hawaiian Airlines*, 129 L. Ed. 2d at 220. Significantly, this Court relied heavily on the earlier decision in *Conrail*, *supra*. In *Conrail*, this Court concluded that an employer's unilateral implementation of a drug testing policy was a "minor dispute" within the meaning of the RLA and, therefore, subject to the grievance and arbitration procedures of the CBA even though the CBA did not contain express provisions on drug testing. In discussing the *Conrail* decision, this Court noted that characterizing a dispute as "minor" under the RLA "is another way of saying that the dispute *does not involve rights that exist independent of the CBA*." *Hawaiian Airlines*, 129 L. Ed. 2d at 219 (emphasis added).

The instant case does not involve a state law whistle blower claim that only concerns respondents' motives. On the contrary, unlike in *Hawaiian Airlines*, respondents' motives are of no consequence here. Moreover, this Court's recognition that privacy rights relating to drug testing do not

exist independent of a CBA further supports the Ninth Circuit's order that petitioners' state law privacy and related claims are preempted by Section 301.[6]

In *Livadas*, a unionized employee brought a civil rights action against California's wage enforcement agency under 42 U.S.C. § 1983 based on the agency's refusal to enforce the employee's statutory claim for late payment of wages under Cal. Labor Code § 203. This Court held that the agency's blanket refusal to enforce unionized employees' statutory claims for late payment of wages under Cal. Labor Code § 203 interfered with the employees' exercise of union activities and, therefore, was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* *Livadas*, 129 L. Ed. 2d at 101-2. This Court rejected the agency's argument that Section 301 prohibited its enforcement of Cal. Labor Code § 203 for unionized employees. In concluding that Section 301 did not compel the agency's enforcement policy, this Court noted that Section 301 preemption has generally been applied to preclude state laws relating to the interpretation or enforcement of a CBA, or re-labeled state tort claims that derive from the CBA (like petitioners' claims here). *Livadas*, 129 L. E. 2d at 109. Where the state law claim is independent of rights under a CBA, Section 301 preemption does not apply. *Livadas*, 129 L. Ed. 2d at 110. This Court held that Section 301 did not bar the agency's enforcement of

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[6]It is also noteworthy that the holding in *Hawaiian Airlines* is based on the same rationale applied by the Ninth Circuit when holding state law discrimination claims are not preempted by Section 301. *Ramirez v. Fox Television Station*, 998 F.2d 743, 748-49 (9th Cir. 1993) (state law discrimination claim is not preempted by Section 301 because only the employer's discriminatory intent is at issue).

Cal. Labor Code § 203 because the employee's entitlement to a statutory penalty for her employer's late payment of wages was not derived from the CBA. *Id.* Significantly, this Court noted, however, that even a claim under Cal. Labor Code § 203 could be preempted by Section 301 where the CBA was at issue. *Livadas*, 129 L. Ed. 2d at 110-11 n. 19.

The Ninth Circuit's order here is completely consistent with *Livadas*, *Hawaiian Airlines*, and this Court's other Section 301 cases. There is no compelling reason to review the Ninth Circuit's order.

C. The Ninth Circuit's Order Is Consistent With Other Ninth Circuit Cases

The order affirming summary judgment for respondents is also supported by other Ninth Circuit cases holding state law privacy and related claims are preempted by Section 301 under nearly identical circumstances. *Schlacter-Jones v. General Tel. of California*, 936 F.2d 435, 440-42 (9th Cir. 1991) (Section 301 preempts state law privacy, fraud, conspiracy, intentional infliction of emotional distress, contract and covenant of good faith and fair dealing claims arising out of employer's unilaterally imposed drug testing policy); *Stikes v. Chevron USA, Inc.*, 914 F.2d 1265, 1269 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 111 S. Ct. 2015, 114 L. Ed. 2d 101 (1991) (state law claims for invasion of privacy, wrongful discharge and intentional infliction of emotional distress arising out of employer's vehicle search policy preempted by Section 301); *Utility Workers of America, Local No. 246 v. Southern California Edison, Co.*, 852 F.2d 1083, 1086 (9th Cir. 1988), *cert. denied*, 489 U.S. 1078, 109 S. Ct. 1530, 103 L. Ed. 2d 835 (1989) (state law privacy and wrongful termination claims

arising out of employer's unilateral random drug testing program preempted by Section 301); *Laws v. Calmat*, 852 F.2d 430, 433 (9th Cir. 1988) (Section 301 preempts state law privacy claim based on employer's unilateral drug testing policy); *Scott v. Machinists Automotive Trades Dist. Lodge No. 190*, 827 F.2d 589, 594 (9th Cir. 1987) (defamation claim arising out of misconduct investigation preempted by Section 301).[7]

There is nothing in *Hawaiian Airlines* or *Livadas* that would warrant review of the Ninth Circuit's order here. These cases actually further support the Ninth Circuit's preemption ruling because they reaffirm that claims which do not exist independent of a CBA, like petitioners' claims here, are preempted. As this Court has held, claims relating to an employer's drug testing/search policy are not independent of a CBA. The earlier Ninth Circuit cases all follow this principle.[8]

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[7]While the Ninth Circuit has not considered when a false imprisonment claim may be preempted, it has repeatedly held claims which are merely "peripheral" to a preempted privacy claim are also preempted. *Stikes*, 914 F.2d at 1270. See *Romero v. Hilton Hotels Corp.*, 137 L.R.R.M. (BNA) 2647, 2649-50 (D. Hawaii 1991) (assault, battery, false imprisonment, and infliction of emotional distress claims arising out of employer's theft investigation preempted by Section 301).

[8]Petitioners incorrectly assert that recent Ninth Circuit decisions have adopted a more narrow application of Section 301 preemption after *Livadas* and *Hawaiian Airlines*. *Felt v. Atchison, Topeka & Santa Fe Railway Co.*, 60 F.3d 1416 (9th Cir. 1995); *Espinal v. Northwest Airlines*, 90 F.3d 1452 (9th Cir. 1996). These cases follow earlier Ninth Circuit decisions holding that statutory discrimination claims are non-negotiable and, therefore,

D. The Full Ninth Circuit Unanimously Rejected Petitioners' Suggestion For Rehearing *En Banc*

Not only does the Ninth Circuit's order comport with its prior Section 301 decisions, the full Ninth Circuit unanimously rejected petitioners' suggestion for a rehearing *en banc*. (Appendix B) That not even one Circuit Judge voted to rehear this case *en banc* further demonstrates that the order is in the mainstream, and does not warrant further review by this Court.

E. The Ninth Circuit's Order Is Consistent With Decisions From Other Circuits

Far from creating a conflict between the circuits, the Ninth Circuit's order is consistent with the great weight of authority from other circuits as well. *See, e.g., Sweigart v. Delmotte*, 148 L.R.R.M. (BNA) 2413, 2415-17 (E.D. Pa. 1994), *affirmed*, 74 F.3d 1228 (3rd Cir. 1995) (Section 301 preempts state law violation of privacy claim resulting from employer's surveillance of employee bathroom); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 529-30 (10th Cir. 1992) (state law claims for invasion of privacy, defamation, false imprisonment, intentional infliction of emotional distress, wrongful termination, and covenant of good faith and fair dealing arising from employer's interrogation of employees were preempted by Section 301); *In Re Amoco Petroleum Additives Co.*, 964 F.2d 706, 710 (7th Cir. 1992) (state law claims for invasion of privacy and infliction of emotional distress based on employer's use of surveillance

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not preempted by Section 301. On the other hand, privacy and related claims are negotiable, and are preempted by Section 301. *Schlacter-Jones*, 936 F.2d at 442.

cameras in employee locker room are preempted by Section 301); *Bagby v. General Motors Corp.*, 976 F.2d 919, 921-22 (5th Cir. 1992) (defamation and intentional infliction claims arising out of theft investigation preempted); *Jackson v. Liquid Carbonic Corporation*, 863 F.2d 111, 119 (1st Cir. 1988), *cert. denied*, 490 U.S. 1107, 109 S. Ct. 3158, 104 L. Ed. 2d 1021 (1989) (state law invasion of privacy claim based on employee's termination for failing drug test preempted by Section 301); *Kirby v. Allegheny Beverage Corp.*, 811 F.2d 253, 256 (4th Cir. 1987) (invasion of privacy claim based on employer's request to search employee's person and vehicle preempted by Section 301); *Strachan v. Union Oil Co.*, 768 F.2d 703, 705-6 (5th Cir. 1985) (defamation, false imprisonment, and false arrest claims arising out of drug investigation preempted by Section 301); *Blanchard v. Simpson Plainwell Paper Co.*, 925 F. Supp. 510 (W.D. Mich. 1995) (false imprisonment claim arising out of drug investigation preempted); *Kelly v. Mercoid Corporation*, 776 F. Supp. 1246, 1253-55 (N.D. Ill. 1991) (state law privacy claim based on employee's termination for refusing urinalysis test preempted by Section 301); *Majors v. U.S. Air, Inc.*, 525 F. Supp. 853, 857 (D. Md. 1981) (false imprisonment and defamation claims arising out of theft investigation preempted).

Even petitioners recognize that the lower courts generally continue to hold state law privacy and related claims are preempted by Section 301. *Proffitt v. International Paper Co.*, 953 F. Supp. 207, 211-12 (S.D. Ohio 1996); *Dancy v. Fina Oil & Chemical Co.*, 921 F. Supp. 1532, 1537-38 (E.D. Tex. 1996); *Wall v. Americold Corp.*, 1997 U.S. Dist. LEXIS 10366 (E.D. Pa. 1997).

Petitioners argue that the lower courts are "confused" and need further guidance on the application of Section 301

to privacy and related claims. Respondents disagree. The few district court or state court decisions that have concluded privacy related claims are not preempted are contrary to the great weight of authority. These cases are inconsistent with the mainstream decisions on Section 301 preemption. That petitioners and a few, isolated lower courts may be "confused" does not warrant review of the Ninth Circuit's order.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

DATED: March 31, 1998

Respectfully submitted,

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